Clerk of the Superior Court
*** Electronically Filed ***
02/06/2020 8:00 AM

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2013-000522 02/04/2020

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
D. Tapia
Deputy

SOUTH POINT ENERGY CENTER L L C PATRICK DERDENGER

v.

ARIZONA DEPARTMENT OF REVENUE, et al. KENNETH J LOVE

MINUTE ENTRY

The Court has Plaintiff's Motion for Summary Judgment in *Bracker* Phase of Litigation, filed September 17, 2019 and Defendants' Cross Motion for Summary Judgment on that same subject, filed October 18, 2019. Briefing on the motions was completed on January 17, 2020.

The Court benefited from very helpful oral argument on the competing motions on January 31, 2020.

Certainly, there is no explicit Congressional authorization for preemption here, though that is not required for preemption to exist. *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). But preemption is not to be presumed lightly. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155-56 (1980).

Bracker therefore imposes a balancing test. "Resolution of conflicts of this kind does not depend on rigid rules or on mechanical or absolute conceptions of state or tribal sovereignty, but instead on a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994), quoting *Bracker, supra* at 145.

At issue here is the imposition of Arizona's personal property tax on South Point, and to analyze that the Court turns to the Second Amended Lease. Notable in it is paragraph 9.1, which gives South Point the option to "remove, repair, replace, modify or otherwise alter" the Facility or

any part of it. If South Point retains the right to remove an improvement, that improvement is by definition not a permanent improvement, which becomes part of the realty. The land itself is not a factor in the tax. Neither is South Point's leasehold interest in the land. In Arizona, leasehold interests are taxed to the fee owner. Since land owned by the Tribe (or, technically, BIA) is exempt from state property taxes, no portion of the fee interest, including South Point's leasehold interest, is taxed.[1] *Contrast Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1331-32 (11th Cir. 2015) (rejecting tax on "a right in land").

The pervasiveness of federal regulation of tribal leases is thus immaterial because no aspect of the lease is subject to tax. Federal regulation of power plants applies to all power plants regardless of their location. Preemption would have to be all or nothing; if state taxation of power plants on reservations is preempted, then so must be state taxation on every power plant in the country. There is no basis for the argument that a regulatory scheme founded upon a Congressional power other than the Indian Commerce Clause is material to the *Bracker* analysis. *See Bracker, supra* at 141-43.

South Point next makes the general argument that the federal government's interest in economic development on reservations is affected by the possibility of double taxation, making the business less profitable. This is addressed in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190-91 (1989):

> It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases—just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements—but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation in (five cited opinions).

That South Point demands few services from the State is of little consequence. "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied. A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of

[1] A.R.S. Const. Art. IX § 2(1). This also answers South Point's argument that, should the personal property tax not be paid, the State could impose a tax lien on the underlying real property, damaging the Tribe. But a tax lien cannot be imposed on property that is exempt from taxation. In addition, A.R.S. § 42-17153 allows a lien only on the "assessed property." As seen, by the terms of the Second Amended Lease, South Point's property never becomes part of the land, so the land is not part of the assessed property.

the cost of government." *Id.* at 190, quoting *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 622-23 (1981).

South Point finally alleges that, although the tax is plainly targeted at its personal property, its incidence actually falls on the Tribe. The Tribe voluntarily agreed to reimburse South Point for taxes it is required to pay the State. South Point claims that as a result, the State is directly taxing the Tribe, something unquestionably forbidden.

Few legal principles are more firmly established than that an indemnitor stands in the shoes of the indemnitee and is entitled to only those defenses that the indemnitee has. Obviously, South Point has no sovereign immunity to invoke. The indemnity clause purports to cloak South Point in the Tribe's sovereignty, making a debt lawfully and enforceably owed by South Point into an invalid and unenforceable debt against the Tribe.

The Supreme Court has, in many of its opinions interpreting Indian law, given only fuzzy guidance to lower courts obliged to pick largely undirected through the historical debris that still guides federal policy toward Native Americans. Occasionally, however, a bright line is drawn. "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville*, *supra* at 155; *see also, e.g., Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95, 113-15 (2005).

The cases brought forward by South Point, chiefly *Seminole Tribe of Florida, supra,* are distinguishable. *Seminole Tribe* addressed a state tax on leaseholds, holding that leases are so connected to the land that their taxation amounts to taxation of the land itself. 799 F.3d at 1329. Amended Lease, protected from becoming part of the realty, so it is not an interest in land. Similarly, *Confederated Tribes of Chihalis Reservation v. Thurston County Bd. Of Supervisors,* 724 F.3d 1153 (9th Cir. 2013) bars based on statute law property taxes against Indian trust lands. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), concerned taxes for schools; the Interior Department had a detailed regulatory plan for Indian schooling, which the state had largely washed its hands of. Here, there are no permanent improvements or affixed property treated as tribal land; nothing about the federal regulation of power plants is more intensive when the plant is on tribal land.

ACCORDINGLY, Defendants' Cross Motion for Summary Judgment is **granted** and Plaintiff's Motion for Summary Judgment is **denied**.